DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California
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BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

TIMOTHY L. KERN and PAMELA KERN, Petitioners, vs. ENTERTAINERS DIRECT, INC., and JOSEPH McGRIEVY, Respondents.	No. TAC 25-96 DETERMINATION OF CONTROVERSY

INTRODUCTION

On July 26, 1996, Timothy L. Kern and Pamela G. Kern (hereinafter "petitioners") filed the above-captioned petition to determine controversy pursuant to Labor Code section 1700.44, alleging that Entertainers Direct, Inc., and Joseph McGrievy (hereinafter "respondents") failed to remit $1,867.50 earned by petitioners on entertainment work that had been procured by respondents. The petition seeks recovery of petitioner's withheld entertainment earnings, plus interest and attorney's fees. On August 6, 1996, petitioners filed an amended petition, modifying the amount allegedly owed to $1,347.50, apparently based on payment of some of the amounts previously alleged as unpaid.

Respondents were personally served with a copy of the amended petition on October 10, 1996, and filed an answer thereto, admitting that some of petitioners' entertainment earnings were being withheld by respondents, but denying that respondents are engaged in the occupation of a talent agency.

A hearing was scheduled for, and held, on July 3, 1997, in San Diego, California, before the undersigned attorney for the Labor Commissioner, specially designated to hear this matter. Petitioners appeared in propria persona. Joseph McGrievy, the president of Entertainers Direct, Inc. appeared on its behalf and also as an individual in propria persona.

Based upon the testimony and evidence received at this hearing, the Labor Commissioner adopts the following determination of controversy.

FINDINGS OF FACT

1. Respondents operate a business providing entertainers, such as clowns, magicians, or costumed characters such as a pirate, the Easter bunny or 'Winnie the Pooh', to parties, corporate events, and San Diego Padres baseball games. Respondents business also operates under the fictitious business names Magic Encounters and Just 4 Kidz. Prior to January 1, 1996, this business was owned as a sole proprietorship by Joseph McGrievy. On January 1, 1996, the business became incorporated as Entertainers Direct, Inc., and has operated as a corporate entity at all relevant times thereafter. Respondents advertise this business, set the prices that are charged to customers for the entertainer's services (indeed, these prices are published by respondents in their advertisements), enter into agreements with

customers wishing to employ the services of entertainers, and then send the entertainers to the customer's event. Respondents determine the entertainers' compensation, and advise the entertainer of the amount he or she will earn prior to sending the entertainer out on the assignment. The customers are billed by the respondents, and may either choose to pay the entertainer directly at the time of the performance (in which case the entertainer keeps his or her earnings and transmits the balance collected to the respondents) or pay the respondents directly either before or after the performance by mailing a check for the amount owed to respondents' business. The respondents then pay the entertainers the agreed upon compensation.

2. Pamela Kern performed twenty hours per week of clerical and secretarial services for Respondents, working in Respondents' office until April 1996, when McGrievy informed her that these services were no longer needed. During the period of time that she performed these clerical/secretarial services, Ms. Kern, along with her husband, Timothy Kern, also worked as entertainers, performing engagements for customers who had contracted with Entertainers Direct, Inc. After being told that her clerical and secretarial services were no longer needed, Ms. Kern filed a claim for unemployment insurance with the Employment Development Department ("EDD"). In processing this claim, the EDD discovered that Respondents had failed to pay employment taxes on behalf of Ms. Kern. Respondents have refused to pay employment taxes, asserting that Ms. Kern was an independent contractor rather than an employee. The EDD undertook an audit but, as of the date of the hearing in this matter, had not yet reached a determination of

this issue.

3. At the time that Ms. Kern filed her complaint with the EDD, Respondents had yet to pay her and Timothy Kern for several entertainment jobs they had performed during the period from December 1995 to April 1996. Angered by Ms. Kern's filing of a claim with the EDD, McGrievy advised the petitioners of his decision to terminate their services as entertainers. McGrievy also decided to withhold payment for previously performed engagements, reasoning that if EDD were to decide that he must pay employment taxes on behalf of Ms. Kern, he would use these withheld earnings for that purpose. Despite repeated demands for payment of these withheld entertainment earnings, Respondents have refused to pay the Kerns the amounts they are owed.

4. In order to recover the withheld entertainment earnings, the Kerns filed this petition to determine controversy, asserting that Respondents acted as a talent agency in procuring these engagements for the Kerns, and that therefore, their dispute with the Respondents over these unpaid earnings should be heard and determined by the Labor Commissioner under the provisions of the Talent Agencies Act (Labor Code sections 1700, et seq.). McGrievy contends that Respondents are not a talent agency, and that the Kerns were independent contractors, and that therefore, the Labor Commissioner has no jurisdiction over this dispute.

5. Respondents have never been licensed by the State Labor Commissioner as a talent agency.

6. As indicated above, petitioners seek payment of $1,347.50 in allegedly unpaid earnings, based on eleven separate performance engagements during the period from December 16, 1995 to April 28,

1996. Respondents concede that petitioners are owed their unpaid earnings in connection with eight of these engagements, for which petitioners are owed $1,087.50. During the hearing, petitioners admitted that one of the engagements on their list of unpaid engagements for which $60 in earnings were purportedly withheld, had been listed in error, as the supporting invoice, obviously generated in an attempt at satire after this dispute arose, identifies the client as "Joseph McGreedy" of "Sub-Standard Entertainers." The petitioners stipulated that on June 4, 1996 they had been paid $60 as payment in full for another one of the engagements they had listed as unpaid, identified by the show date of April 13, 1996. Thus, the only remaining engagement in dispute was identified on the petitioners' list as 'Kids Corner-Goldbar', with a show date of April 13, 1996, for which petitioners were purportedly owed $150. According to McGrievy, the petitioners were not paid for this job because they failed to collect the money that was owed by the customer at the time of the performance, that it was the petitioners' responsibility to collect any money owed by the customer, and that the respondents have never been paid by the customer. According to Pamela Kern, petitioners asked the customer to pay at the conclusion of their performance; the customer stated that he did not have his check book, but promised to mail the amount he owed to the respondents' business; that shortly thereafter, Ms. Kern informed McGrievy that the customer owed this money, and that it then became McGrievy's responsibility to collect the money. McGrievy conceded that he did not take steps to collect the amount owed by this customer, and for that reason, we conclude that petitioners are entitled to

payment of the $150 they were promised for the performance of this engagement. Thus, adding this $150 to the $1,087.50 concededly owed by respondents, we conclude that petitioners are owed a total of $1,237.50 in unpaid entertainment earnings. Of this total owed, only $50 is owed for work performed prior to January 1, 1996 (that is, while the business was a sole proprietorship), the balance of $1,187.50 is owed for work performed for the corporate respondent. The only issue that remains is the legal question of whether the Labor Commissioner has jurisdiction, in a proceeding brought under the Talent Agencies Act, to order the payment of these amounts owed.

CONCLUSIONS OF LAW

1. Under the Talent Agencies Act, a "talent agency" is defined as "a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists." Labor Code section 1700.04(a). The term "artists" includes "persons rendering professional services in motion picture, theatrical, radio, television, and other entertainment enterprises." Labor Code section 1700.04(b). A talent agency procures employment for an artist when the agency represents the artist in locating employment and negotiating the terms of that employment; that is, a talent agency is not the employer of the artist but rather the artist's agent for purposes of employment procurement with a third-party employer. (See Chinn v. Tobin, Case No. TAC 17-96) A talent agency does not set the artist's compensation; rather, the agency negotiates with the third party employer of the artist's services to secure the best possible deal for the artist.

Here, respondents' business did not involve the representation of artists vis-a-vis third party employers or the negotiation of artists' compensation. Instead, respondents' business operated as a clearinghouse of entertainers who were provided by the respondents to customers who contracted with the respondents (rather than the entertainers) for these entertainment services. Respondents established the rates charged to these customers, and set the rates that were paid -- by respondents -- to the entertainers that respondents provided to these customers. By operating its business in this fashion, respondents became the direct employer of the performers, rather than the performers' talent agency. Consequently, this is not a dispute between a "talent agency", within the meaning of Labor Code section 1700.04(a), and an artist or artists, and as such, this dispute does not arise under the Talent Agencies Act. Labor Code section 1700.44 vests the Labor Commissioner with jurisdiction to hear and determine disputes between artists and talent agents that arise under the Talent Agencies Act. Since this dispute does not involve a "talent agency" and does not arise under the Talent Agencies Act, the Labor Commissioner lacks jurisdiction to determine this dispute under Labor Code section 1700.44.

2. Other sections of the Labor Code give the Labor Commissioner jurisdiction to investigate disputes between employees and employers involving unpaid wages, and to prosecute court actions for the collection of wages and penalties payable to employees. See Labor Code sections 96 and 98.3. To determine if these statutes governing unpaid wage claims are applicable to this dispute, it is necessary to determine whether the petitioners,

with respect to the work they did as entertainers, were independent contractors or employees of the respondents. If the petitioners were employees, the Labor Commissioner would have jurisdiction to prosecute their claim for unpaid wages. If, on the other hand, petitioners were independent contractors, the Labor Commissioner would lack jurisdiction to grant any relief or to prosecute any claim, and petitioners only avenue of redress would be to file a court action for breach of contract..

3. Borello & Sons v. Department of Industrial Relations (1989) 48 Cal. 3d 341, is the leading case on the issue of whether a person engaged to provide services is an independent contractor or an employee. In Borello, the Supreme Court rejected the traditional common law focus on control of work details as the critical determinative factor in analyzing a service relationship. Instead, the Borello court adopted a multi-factor test, which includes, in addition to the extent to which the principal controls the manner in which the work is performed, the following factors: whether the person performing the services is engaged in a business or occupation distinct from that of the principal, or whether the services rendered are part of the regular business of the principal; whether the principal or the worker supplies the instrumentalities, tools, and the place in which the work is performed, that is, the extent to which each party to the relationship has invested in the business; whether the person providing the service has an opportunity for profit or loss based on his managerial skill; the degree of permanence of the working relationship; and whether the service requires special training and skills characteristic of licensed contractors. The Supreme

Court noted that these "individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations." Id., at 351. Thus, the absence of control over work details is of no consequence "where the principal retains pervasive control over the operation as a whole, the worker's duties are an integral part of the operation, the nature of the work makes detailed control unnecessary, and adherence to statutory purpose [of remedial laws intended to protect workers] favors a finding" that the person providing the service is an employee of the principal and not an independent contractor. Yellow Cab Cooperative, Inc. v. Workers Compensation Appeals Bd. (1991) 226 Cal.App.3d 1288, 1295. "The label placed by the parties on their relationship is not dispositive, and subterfuge will not be countenanced," and "one seeking to avoid liability has the burden of proving that persons whose services he has retained are independent contractors rather than employees." Borello, supra, at p. 349.

4. Here, petitioners worked as entertainers for a business that provides customers with entertainment services. The work that petitioners performed, as clowns and other costumed characters, was an integral part, if not the essential core, of the respondents' business. "This permanent integration of the workers into the heart of [the] business is a strong indicator that [the principal] functions as an employer. . . . The modern tendency is to find employment when the work being done is an integral part of the regular business of the employer and when the worker, relative to the employer, does not furnish an independent business service." Ibid, at p. 357. Respondents paid for all

advertising, and maintained an office from which the business was run. Also, respondents provided the petitioners, and the other entertainers who were sent out on performances, with any necessary costumes. Petitioners' investment in the business, in contrast, was at best negligible. These facts also point towards an employee/employer relationship. Petitioners had no opportunity to profit, and faced no risk of loss, as a result of their "management" of the business, as the facts show that they did not play any "managerial" role. Prices charged to customers were set by the respondents; the petitioners had no authority to negotiate with customers with respect to prices. Petitioners did not possess any business or occupational licenses. Finally, whatever acting skills were required in performing the work as clowns costumed entertainers, these skills do not differentiate the petitioners from clowns employed by a circus, or costumed characters employed by Disneyland; that is, these skills are not particularly indicative of independent contractor status. These various factors, taken as a whole, compel the conclusion that petitioners worked for the respondents as employees, and that the Labor Commissioner therefore has jurisdiction over petitioners' claim as a claim for unpaid wages.

5. It is unlawful for an employer to deduct money from an employee's wages unless the deduction is authorized by Labor Code §224, which authorizes deductions made pursuant to a written agreement with the employee, a collective bargaining agreement, or a federal or state statute that requires the employer to make the deduction from the employee's wages. Respondents' purported withholding of petitioners' wages is not authorized under Labor

Code §224, and hence, is unlawful.

6. These unpaid withheld wages owed to petitioners for the work they performed as clowns and costumed entertainers on behalf of respondents' business are long overdue. Labor Code section 201 provides that when an employer discharges an employee, all earned and unpaid wages are due and payable immediately at the time of the discharge. Pursuant to Civil Code §§3287 and 3289, petitioners are also entitled to interest on the unpaid wages, at the rate of 10% per annum from the date the wages became due. Petitioners are therefore entitled to payment of $1,237.50 for unpaid wages, plus $164.99 in interest, for a total of $1,402.49, apportioned as follows: respondent McGrievy is liable for $50 in unpaid wages and $6.67 as interest, for a total of $56.67, and respondent Entertainers Direct, Inc., is liable for $1,187.50 in unpaid wages and $158.32, for a total of $1,345.82.

7. Petitioners are not seeking any penalties in this proceeding. We note, however, that under Labor Code section 203, an employer who willfully fails to pay all earned and unpaid wages immediately at the time of an employee's discharge is liable for penalties, in an amount equal to thirty days' wages of the discharged employee.

8. Having determined that respondents are not a "talent agency" within the meaning of the Talent Agencies Act, it is beyond the scope of the Labor Commissioner's jurisdiction to grant relief *in this proceeding,* a determination of controversy under the Talent Agencies Act. We cannot issue an order, in this Determination, that respondent pay the money that is owed to the petitioners because such an order could only be made if there is a

controversy within the meaning of the Talent Agencies Act, and here, there is none. But that does not end this matter. Having found that petitioners were employed by respondents, and that petitioners are owed unpaid wages for services performed during this employment, we may use this Determination to apprise respondents that unless full payment of the unpaid wages and interest, in the total sum of $1,402.49, is made within ten days of the date of this Determination, the Labor Commissioner will file a civil action against respondents, pursuant to Labor Code §98.3, to recover the unpaid wages, interest, and also, if appropriate, penalties pursuant to Labor Code section 203.

ORDER

For the above-stated reasons, IT IS HEREBY ORDERED that the petition to determine controversy under Labor Code section 1700.44 is dismissed due to a lack of controversy within the meaning of the Talent Agencies Act. However, the parties are to report back to the undersigned attorney within ten days as to whether full payment in the amount of $1,402.49 has been made to the petitioners for unpaid wages and interest. Absent proof of such payment, the Labor Commissioner will file a civil action pursuant

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to Labor Code §98.3 for the collection of said wages, interest, and also, if appropriate, penalties pursuant to Labor Code §203.

Dated: 8/17/98

MILES E. LOCKER
Attorney for the Labor Commissioner

The above decision is adopted in its entirety as the Determination of the Labor Commissioner.

Dated: 8/20/98

JOSE MILLAN
State Labor Commissioner

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS - DIVISION OF LABOR STANDARDS ENFORCEMENT

CERTIFICATION OF SERVICE BY MAIL
(C.C.P. §1013a)

(TIMOTHY L. KERN and PAMELA G. KERN v. ENTERTAINERS DIRECT; JOSEPH McGRIEVY)
(TAC 25-96)

I, MARY ANN E. GALAPON, do hereby certify that I am employed in the county of San Francisco, over 18 years of age, not a party to the within action, and that I am employed at and my business address is 45 Fremont St., Suite 3220, San Francisco, CA 94105.

On August 19, 1998, I served the following document:

DETERMINATION OF CONTROVERSY

by placing a true copy thereof in envelope addressed as follows:

TIMOTHY L. KERN
PAMELA G. KERN
5261 Canning Ct.
San Diego, CA 92111

JOSEPH McGRIEVY, President
ENTERTAINERS DIRECT, INC.
5127 Diane Avenue
San Diego, CA 92117

and then sealing the envelope with postage thereon fully prepaid, depositing it in the United States mail in the city and county of San Francisco by ordinary first class mail.

I certify under penalty of perjury that the foregoing is true and correct. Executed on August 19, 1998, at San Francisco, California.

Mary Ann E. Galapon
MARY ANN E. GALAPON

CERTIFICATE OF SERVICE BY MAIL